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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re A. T. et al., Persons Coming Under the Juvenile Court Law.	
SAN JOAQIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. A. T., Defendant and Appellant.	C061131 (Super. Ct. No. J03837)

A. T., father of the minors, appeals from orders of the juvenile court terminating his parental rights as to two of his girls. (Welf. & Inst. Code,[1] §§ 366.26, 395.) Appellant contends the court erred in finding he was an alleged, rather than a presumed, father. He further asserts that he was denied due process because he did not have proper notice of the

[1] All further section references are to the Welfare and Institutions Code.

proceedings or timely appointment of counsel and that the evidence does not support the court's finding that the Indian Child Welfare Act (ICWA) 25 United States Code section 1901 et seq. did not apply. We reverse for compliance with the notice provisions of the Indian Child Welfare Act.

FACTS

The San Joaquin County Human Services Agency (agency) removed the seven minors, four boys and three girls, ranging in age from 6 months to 10 years, from the mother's custody in March 2005.[2] The petition alleged the mother had a history of methamphetamine use and had left the minors alone in inadequate housing. The petition further alleged that appellant, designated as an alleged father, had a history of mental health problems when not taking appropriate medication. The parents' whereabouts were unknown when the petition was filed.

The detention report stated that the maternal grandmother, with whom some of the minors were living, had contacted the mother but the mother refused to disclose her location or telephone number. In prior contacts with the agency, the mother identified appellant as the father of all but one of the minors and appellant was known to be living with the family in 2002 but not in 2003. Appellant was not married to the mother and there was no information available on whether he had paid child

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[2] The eighth and oldest sibling, Alexander, was removed under a separate petition in June 2005 and for a time his case was handled in conjunction with this one.

support for them. The detention report gave an address for the father on North California Street in Stockton, which was the address of the paternal grandmother, but there is no evidence notice of the hearing was sent to him there. Notice to the mother sent to that address was returned as "attempted not known." The court ordered the minors detained.

The mother first appeared at the jurisdiction hearing in April 2005 and claimed Apache Indian heritage. Appellant did not appear at the hearing. Neither the court nor the social worker made an inquiry of the mother concerning paternity or the location of any father or of any paternal relatives.

A parent locator search in April 2005 provided two possible addresses for appellant. The most recent being an address on North Sierra Nevada Street, along with a telephone number, and another, former, address on North Commerce Street.[3] Notice of the jurisdiction hearing was sent to both addresses. The notice sent to North Commerce Street was returned, the other was not. There is no evidence of any attempt to call the telephone number.

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[3] The parent locator search is performed using a form with a list of possible contacts for locating addresses. The person performing the search dates each person or entity on the list which has been contacted and stops looking when a current address is found. If no information is provided on the form it is because none was available. In this case, the person conducting the search contacted the family support division and a computer database which would have disclosed if appellant were receiving public assistance including receiving mail at the "homeless" address. Neither search provided any contact information.

Prior to the jurisdiction hearing in June 2005, the social worker interviewed the mother who said appellant had been in and out of jail for the past 15 years and that she began living with him when she was 15. The mother also said that approximately four and one-half years earlier she and the children lived in the backyard of the paternal grandmother. The court sustained the petition as to appellant. The court received evidence, including the parent locator search, of attempts to serve appellant with notice of the hearing and found the agency expended reasonable efforts and due diligence in attempting to locate him.

The jurisdiction report stated the Indian Child Welfare Act did not apply, however the report did not state notices were sent to the Apache tribes and no notices or proofs of service of notices to any Apache tribes appear in the record. At a contested hearing in July 2005, the court sustained the petition as to the mother and set a dispositional hearing.

By this time, a petition had been filed in the oldest sibling's case. In July 2005, a second absent parent locator returned three possible addresses for appellant, one of which was the North Sierra Nevada address. The locator also found a telephone number, but there is no evidence the social worker called the number. Notice of hearing in Alexander's case was sent to the remaining two addresses, i.e., South Stanislaus Street and "Nightengale" Avenue. Neither notice was returned. Thereafter, appellant's address in the sibling's case was listed as unknown.

The disposition report in this case stated the Indian Child Welfare Act did not apply. The report referred to the due diligence search for appellant conducted in April 2005 and stated notice of the jurisdiction hearing was sent to appellant at all addresses on file with no response. However, no notice of the dispositional hearing was sent to appellant at any address. The report stated the mother again said that appellant was the father of six of her seven children and asserted that he was an alcoholic and currently homeless. The mother further said she had been in a relationship marked by ongoing domestic violence with appellant for 15 years until she left appellant in 2003. At the disposition hearing in August 2005, the court adopted the agency's recommendation that no services be offered to appellant as an alleged father unless he established paternity and ordered a reunification plan for the mother.

In October 2005, a letter was sent to appellant at the North California Street address but was returned "attempted not known." No other attempt to mail notice of the ongoing proceedings appears in the record.

The six-month review report stated the four boys were placed in a foster home, two of the girls were placed with a maternal aunt and the youngest girl was placed with another maternal aunt. The agency recommended, and the court ordered, further services for the mother at the 6- and 12-month review hearings.

The 18-month review report stated the mother had stabilized her housing and recommended returning the boys to her custody

while continuing reunification services for the girls. The court adopted the recommendation in November 2006. However, due to a change in the mother's circumstances, the minors were not returned and, at a review hearing in May 2007, the court terminated her services and set a section 366.26 hearing. In June 2007, the court ordered a permanent plan of long-term foster care for the boys.

The August 2007 assessment for the selection and implementation hearing for the girls stated they were likely to be adopted by the maternal aunts with whom they lived. The hearing was continued several times for service on the fathers.

In September 2007, a review report in the boys' case was sent to appellant at the Nightingale address. A manila envelope which appeared in the boys' social worker's file in the fall of 2007 had a return address containing appellant's name and the Nightingale address as well as a handwritten notation, "Does not live at this address Please send this to the right address where it goes to ok." The social worker concluded appellant's whereabouts were unknown. In the fall of 2007, the social worker for the boys spoke to the mother who said appellant had talked to her and wanted to visit the minors but the mother was unable to provide any contact information for appellant. In December 2007, appellant contacted the social worker for the boys seeking visitation and delivered Christmas gifts for them but declined to provide his contact information. Appellant appeared at a February 2008 review hearing for the boys.

Counsel was appointed for appellant and he designated a permanent address in Acampo, California.

Another parent locator search was conducted in January 2008 in the girls' case which provided two new addresses, i.e., Fremont Street and North Wilson Way, in Stockton, California. The permanent address appellant designated in the boys' case was evidently not transmitted to the girls' social worker and the social worker requested service by publication of the notice of the section 366.26 hearing on appellant. Counsel for appellant appeared in the girls' proceedings in April 2008. Ultimately, notice of the section 366.26 hearing was sent to appellant in May 2008 to the address he previously designated. At the June 2008 hearing, appellant requested a contested hearing and new counsel was appointed.

Prior to the selection and implementation hearing, appellant filed a motion seeking presumed father status arguing there had not been due diligence in searching for him given the information available to the social worker. He further argued he had no notice of the proceedings, was served with no documents, was incorrectly labeled an alleged father, should have had counsel appointed at the outset due to his known disability resulting from his mental health problems and, due to the lack of notice, was unable to assert his proper status and receive reunification services at an earlier date. His declaration attached to the motion stated he was homeless from 2004 to 2007 and had not lived with the minors during that time. He became aware of the dependency proceedings in 2007 when he

met the maternal grandmother at a bus stop and was informed of the current circumstances.

An update report in July 2008 for the girls stated their social worker had spoken to appellant, who wanted to visit the minors, and had a current address and telephone number for him. A status review report in August 2008 for the boys stated that they had visited appellant but had no interest in living with him. The case was again continued for several months.

Before the contested hearing in December 2008, the parties stipulated to an extensive list of facts which included the status of the case, the history of the social workers' attempts to locate appellant in both this and the oldest sibling's case, and appellant's eventual appearance in the cases. It was further stipulated that appellant would testify that he never received notice of the dependency prior to December 2007 just before dropping off gifts for the minors; he was the biological father of all but the youngest minor and has acknowledged them as his own children; he and the mother lived together for many years while the children were growing up and for a time they lived with the paternal grandparents; he last lived with the mother and the minors in 2004 when they had to leave the house where they had been living on Commerce Street; he has been diagnosed with schizophrenia, bipolar disorder and paranoid delusions and chose to stop taking medications seven or eight years ago because he believed he did not need them; he was homeless from late 2004 until the late fall of 2007 and living in various abandoned buildings; during part of that time he

received general relief and food stamps and got mail through the mailbox for the homeless at the welfare office. It was also stipulated that before he learned the minors were in foster care, appellant believed they were with the mother and he is currently accepting mental health care and taking his prescribed medications. The parties also stipulated that the maternal aunt caring for the two girls who are appellant's biological children would testify that in 2003, appellant and the mother gave the younger three children to the maternal grandmother to care for them and appellant did not visit or contact them thereafter. The birth certificates attached to the stipulation showed appellant was listed as the biological father for three of the four boys and neither of the two girls.

At the hearing in December 2008, appellant testified he did not know the exact year he and the mother separated and she never told him she left the younger children with the maternal grandmother. Before the mother left, they were living with the paternal great-grandmother at the Nightingale address after having been evicted from the Commerce Street address. The paternal great-grandmother still resided at the Nightingale address and he used that address in 2005. Appellant identified the North Sierra Nevada Street address as the paternal grandfather's former address. He stated he had some contact with his sister and the paternal grandparents during his period of homelessness but did not see the paternal great-grandmother. Appellant noted that his memory was poor due to his mental illnesses. Appellant stated he was currently using the paternal

grandmother's address in Acampo, California. Appellant identified the telephone numbers which were found in the parent locator searches as those of the paternal grandmother and the paternal great-grandmother.

The court took the matter under submission and in January 2009 issued its ruling denying the motion to vacate the jurisdiction and disposition findings and orders, found appellant was the biological father of the six older minors but was the presumed father only of the boys. The court directed the agency to assess appellant for services as to the boys but not the girls.

DISCUSSION

I

Status Of Presumed Father As To The Girls

Appellant contends the juvenile court erred in denying his request for presumed father status and his request to vacate the jurisdiction and disposition hearings. He contends the initial error in designating him an alleged father deprived him of notice, appointment of counsel, and reunification services and the error was perpetuated by failing to find him a presumed father as to the girls. Appellant further argues that failing to vacate the jurisdiction and disposition findings and orders in light of the denial of due process stemming from failure to provide the notice to which he was entitled as a presumed father resulted in erroneous termination of his parental rights.

A

Appellant's Status

Appellant contends he was entitled to presumed father status from the outset. He argues that the facts known to the agency and the court from the time the petition was filed through the disposition hearing support a finding he was a presumed father. We disagree.

In dependency law, a father may be alleged, biological, or presumed. (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) The rights and duties of a father are defined by his status as one of these three. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050-1051; *Paul H.*, at p. 760.) The most favored status is presumed father because only such fathers are entitled to custody and reunification. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449.)

Under California Law, a presumption of fatherhood may arise in several ways. (Fam. Code, § 7611.) In this case, appellant relies on the statutory provision that a man is presumed to be the father of a child if he "receives the child into his home and openly holds out the child as his natural child." (*Id.*, § 7611, subd. (d).)

Both conditions of the statute must be satisfied to establish the presumption. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652.) Thus, a man must openly and publicly admit paternity and *physically* bring the child into his home. (*Adoption of Michael H.*, *supra*, 10 Cal.4th at p. 1051; cf. *In re Spencer W.*, *supra*, 48 Cal.App.4th at pp. 1653-1654, 1655

[presumed status not shown where man acknowledged paternity to friends and family but not when there might have been consequences adverse to him and further did not receive the minor into *his* home but instead lived in a home provided by the mother].)

A biological or alleged father may change his status by taking steps to initiate the parental relationship which is the hallmark of presumed father status but if the steps are not taken in a timely manner, a father may lose the opportunity to develop the biological connection which exists. (*In re Zacharia D., supra,* 6 Cal.4th at pp. 452-454.)

At the time the petition was filed, the agency was aware the mother had identified appellant as the father of all but one of the minors and that he had not lived with the family after 2003, although he did so prior to that time. The agency also knew of appellant's mental health issues. It did not appear appellant was married to the mother and there was no information he had supported the minors. The mother was not initially available to provide further information. Birth certificates had not yet been secured. The information available to the agency did not support a conclusion that appellant was a presumed father and the agency correctly listed him as an alleged father in the petition.

Prior to the jurisdiction hearing in June 2005, the social worker interviewed the mother and discovered she had a 15-year relationship with appellant, marked by appellant's absences when he was incarcerated. The social worker also learned the mother

and children had lived in the paternal grandmother's backyard several years earlier. No new information regarding appellant's parental status appears in the reports. Again, the evidence, even if taken most favorably to appellant, would support a finding of biological fatherhood but nothing established the two statutory conditions which could substantiate presumed father status and the court did not err in failing to find it.

The mother was again interviewed prior to the disposition hearing and said she became pregnant when she was 14 by appellant who was a neighbor. She also said he was the father of all but one of her children and was currently homeless. The mother said she had a relationship with appellant until she left him in 2003. Birth certificates had not yet been obtained. Taking all of the evidence from prior agency reports up to the interview with the mother before disposition, there is still no evidence to support presumed father status. The mother states six of the seven children are appellant's but there is no evidence he admitted paternity openly and publicly. The mother states that they lived together when appellant was not incarcerated over their 15-year relationship but there is no evidence who provided the home or support for the minors or that appellant even had a home into which he could receive them. The closest evidence on that point is the period of time when the mother and children lived in the backyard of the paternal grandmother but there is no evidence appellant arranged for that or provided support for the family during that time. After the mother left him there was no evidence of support or any parental

activity whatsoever on appellant's part. The court could not have found that appellant was more than an alleged father at the time of the disposition hearing.

For the hearing on the motion seeking presumed father status, appellant stipulated he was the biological father of all but the youngest minor and acknowledged them as his own. Appellant further stipulated he had lived with the mother and the children for many years. However, he also testified that since 2004 he had been homeless and living in various abandoned buildings while in the grip of his untreated mental illness, the relapse brought on by his own decision not to continue taking his medication. During this period, he certainly had no home into which he could receive the minors and there is no suggestion that he attempted to provide for them in any way, merely assuming that they were with the mother. There was no testimony on how or whether he provided for the family before the mother left him except that they lived in the paternal grandmother's backyard for a while after being evicted from their residence. Again, the court was left to speculate how that came about and who was responsible for providing the residence from which they were evicted. By the time of the hearing, in December 2008, birth certificates had been secured but appellant was not listed as the father on the girls' birth certificates and personally signed only two of the other minors' birth certificates. Certainly as to the girls, the evidence established, at most, one of the two statutory conditions for presumed father status. Taken as a whole, the evidence did not

show the parental relationship which is the foundation of the presumed father status defined in Family Code section 7611, subdivision (d). The court did not err in concluding appellant was a biological, not a presumed father as to the girls. Because appellant was not entitled to presumed father status, his claims which depend upon that status necessarily fail.

B

Notice

Appellant's status as an alleged or presumed father does not affect the notice requirements for the jurisdiction and disposition hearings. (§ 291.) Thus, the issue is whether reasonable efforts were made to ascertain a viable address to provide notice of the proceedings to him.

Dependency statutes require that the court inquire of the mother the identity and location of all fathers. (§ 316.2.) The rules of court also require the court and the agency to make such an inquiry. (Cal. Rules of Court, rule 5.635.) There is no dispute that such inquiries were not made by the court. Information from the mother garnered over time by the agency was meager at best.

Due process requires the father be given adequate notice of juvenile dependency proceedings and an opportunity to present objections. (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418; *In re B. G.* (1974) 11 Cal.3d 679, 688-689.) When a parent is missing or unknown "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree

foreclosing their rights." (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 317 [94 L.Ed. 865, 875]; see *Melinda J.*, at pp. 1418-1419.) Nonetheless, notice must be reasonably calculated under all the circumstances to acquaint the absent parent with the pending action and by a means that one giving the notice might reasonably adopt to accomplish it. (*Mullane*, at pp. 314-315 [94 L.Ed. at pp. 873-874].) Thus, the agency has a responsibility to use due diligence to provide notice to an absent parent. (*County of Orange v. Carl D.* (1999) 76 Cal.App.4th 429, 439.) A thorough investigation and inquiry conducted in good faith constitutes reasonable diligence when attempting to notify an absent parent. (*In re J.H.* (2007) 158 Cal.App.4th 174, 182.) Where there has been some effort to serve notice on a parent, errors in notice are subject to the harmless-beyond-a-reasonable-doubt standard. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 193.)

When the minors were detained and the jurisdiction and disposition hearings were being held, appellant was homeless. The first parent locator search provided the North Sierra Nevada address to which notice of the dependency proceedings was sent and not returned. The agency could reasonably assume that this most recent address was viable. Under the circumstances, this attempt to provide notice constituted due diligence in spite of the lack of statutory inquiry by the court. Even when the mother was questioned about appellant for the disposition report, the most she could say was that he was homeless. As appellant later testified, the North Sierra Nevada Street

address was the paternal grandfather's home and appellant was in intermittent contact with the paternal grandfather during his homeless period. Thus, the notice was sent to a paternal relative who might have had contact with appellant.

The second parent locator search in Alexander's case provided two more addresses. Incomplete notice of dependency proceedings was sent to both addresses, one of which, "Nightengale" Avenue, was the paternal great-grandmother's address where appellant, the mother and the minors had stayed for a period of time and which appellant said he used in 2005.[4] Again, the notices were not returned although later an envelope from the Nightingale address was sent to the agency indicating appellant did not live there. Again, notice of the proceedings was sent to a paternal relative and to an address appellant was actually using at the time.

Both parent locator searches queried agencies which might be expected to have had contact with appellant. Both searches provided addresses of paternal relatives. However, appellant was not maintaining contact with his relatives or the mother and was living in abandoned buildings. Doubtless more extensive efforts could have been made to track down an absent parent but there is nothing to suggest additional efforts would have been more efficacious. The efforts which were made were reasonable

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[4] The street name is misspelled. However, there is no indication that the misspelling resulted in the post office returning the notice.

and in good faith despite the lack of compliance with statutory requirements. Appellant does not suggest that, at the time of the jurisdiction and disposition hearings in 2005, he had an address at which he regularly received mail which could have been found by an additional search. Unlike cases in which no effort was made to notice the absent parent, efforts were made in both this case and the older sibling's case. Any errors in the notice process were harmless beyond a reasonable doubt.[5] (*In re J.H.*, *supra*, 158 Cal.App.4th at p. 183; *County of Orange v. Carl D.*, *supra*, 76 Cal.App.4th at pp. 439-440 [total absence of effort to notice although address known]; *In re Melinda J.*, *supra*, 234 Cal.App.3d at p. 1419.)

As we have discussed, the evidence did not show that appellant was entitled to presumed father status. As an alleged father, he was not entitled to ongoing notice of review hearings and there was no error in failing to send notice for them or in failing to conduct further locator searches to update information on his whereabouts. (§ 292, subd. (a).)

C

Counsel

Parents in dependency proceedings are entitled to appointed counsel "[w]hen it appears to the court that a parent . . . desires counsel but is presently financially unable to afford

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[5] This is particularly true in light of the fact that when appellant did contact the social worker in late 2007, more than two years after the minors' detention, he refused to provide contact information.

. . . counsel." (§ 317, subd. (a)(1).) Until appellant appeared and expressed a desire for counsel, the court was not obligated to appoint an attorney to represent him regardless of his suspected mental state. In any case, an alleged father is not entitled to appointed counsel. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.)

II

Compliance With The ICWA

Appellant contends reversal is required for compliance with the notice provisions of the ICWA.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and the agency have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; see § 224.2; Cal. Rules of

Court, rule 5.481(b).) Failure to comply with the notice provisions and determine whether the ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

Copies of the notices and proofs of service of the notices must be filed with the court as this facilitates review of the existence, adequacy, and accuracy of the notices and proofs of service. (§ 224.2, subd. (c); Cal. Rules of Court, rule 5.482(b); *In re Merrick V.* (2004) 122 Cal.App.4th 235, 247.)

In response to the court's inquiry at her first appearance, the mother claimed Apache heritage. The record is devoid of any suggestion that notices were sent to the Apache tribes. All that appears is a notation in the reports that the ICWA does not apply. Reversal is necessary to permit compliance with the notice requirements of the ICWA.

Respondent argues that the notations in the reports that ICWA did not apply were adequate to show compliance with the notice requirements of ICWA. We disagree. Even before filing notices and proofs of service was required by statute and rule, it was necessary that the record demonstrate that the social worker sent proper notice. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739 [no record that the agency sent any notice]; *In re Levi U.* (2000) 78 Cal.App.4th 191, 198 [statement of social worker that the BIA was noticed]; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108 [social worker's statement that notice had been provided to the tribe would have been

adequate but cannot presume proper notice when the social worker stated a "'request for verification'" had been sent].) This record does not demonstrate notice was sent.

Respondent also argues that although the mother claimed Indian heritage she did not object in the juvenile court or raise the issue in an appeal thus the issue has been forfeited and cannot be asserted by appellant. The right to notice of the proceedings belongs to the tribe and cannot be forfeited by parental inaction. (*In re Marinna J.*, *supra*, 90 Cal.App.4th at p. 739.)

DISPOSITION

The orders terminating parental rights are reversed and the matter is remanded for the limited purpose of determining whether the agency complied with the notice provisions of the ICWA and whether the ICWA applies in this case. If, after proper inquiry, the juvenile court determines that the tribe or the BIA was properly noticed and there either was no response or the tribe or the BIA determined that the minors are not Indian children, the orders shall be reinstated. If notice was not given, the juvenile court shall order the agency to comply promptly with the notice provisions of the ICWA. Thereafter, if there is no response or if the tribe or the BIA determines the minors are not Indian children, the orders shall be reinstated. However, if the tribe or the BIA determines the minors are Indian children or if information is presented to the juvenile court that affirmatively indicates the minors are Indian children as defined by the ICWA and the court determines the

ICWA applies to this case, the juvenile court is ordered to conduct a new selection and implementation hearing in conformance with all provisions of the ICWA.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.